

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Alteration of the
Cross-Section of Unnamed Basin
61-287W by David W. Gustafson,
Carol Gustafson, Lowell G. Wakefield,
Darlene Wakefield, Bruce E. Nystrom,
JoAnn Nystrom, and Patrick J. Flynn
without a Permit from the
Commissioner of Natural Resources

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
RECOMMENDATION AND
MEMORANDUM

This matter was heard on March 2, 1999 in Glenwood, Minnesota before Allan W. Klein, Administrative Law Judge. The hearing concluded in one day. It was followed by an attempt at mediation with another administrative law judge, which was unsuccessful. The record closed on May 10, 1999.

Appearing on behalf of the Department of Natural Resources was Assistant Attorney General Peter L. Tester, 445 Minnesota Street, Suite 900, St. Paul, Minnesota 55101-2127. David W. Gustafson and Bruce E. Nystrom appeared on behalf of the landowner group,^[1] without benefit of counsel. Mr. Gustafson's address is 2075 Viburnum Trail, Eagan, Minnesota 55122, and Mr. Nystrom's address is 13083 – 79th Street Northwest, Annandale, Minnesota 55302.

NOTICE

Notice is hereby given that, pursuant to Minn. Stat. § 14.61, a final decision by the Commissioner shall not be made until this Report has been made available to the parties for at least ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Commissioner. Parties desiring to file exceptions or present argument should contact Allen Garber, Commissioner of Natural Resources, 500 Lafayette Building, St. Paul, Minnesota 55155, to ascertain the procedure and timing.

STATEMENT OF ISSUE

Whether the landowners must comply with the Order of the Commissioner dated June 2, 1998, and remove the road which they placed across the wetland and take the other measures directed in that Order.

Based upon all of the files and proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Unnamed Basin 61-287W (hereinafter the “wetland” or the “basin”) is located approximately five miles southeast of the City of Glenwood, in Pope County, Minnesota. The wetland is a public water of the State of Minnesota, having been included in the state’s public waters inventory list in 1987. The wetland covers over 100 acres, with approximately 38 acres being below the ordinary high water level. Normally, the water in the basin is nine feet deep.

2. The land surrounding the wetland is owned almost entirely by the landowners, who purchased the property in 1985. The only portion of the wetland which is not owned by the landowners is the extreme western tip.

3. The landowners own a total of 240 acres in Section 25 of Grove Lake Township. They own the southeast one-quarter of the section (160 acres) and, in addition, they own the 80 acres immediately north of that, the south half of the northeast one-quarter.^[2] Just to the south of the property is the Sedan State Wildlife Management Area, and all around the property are numerous wetlands, small lakes, and even a few larger ones. Exhibit 9, the USGS quadrangle map for Terrace, Minnesota, illustrates the variety of wetlands and water bodies in the area. That, in fact, is what attracted David Gustafson and the other landowners to the property – they wanted to use it for hunting. All of this wet land and water, however, creates access problems. In order to drive a truck onto the property, it is necessary to drive from a road which bisects Section 30, which lies to the east of Section 25, drive across land owned by somebody else, and enter Section 25 from the east. The southeast quarter of Section 25 is dominated by the water body in question (Unnamed Basin 61-287W) and a marsh area which extends to the south of it all the way down to the bottom of the section. Indeed, the only way to get from the southeast quarter to the southwest quarter by vehicle is across a dike or beaver dam which separates the unnamed basin from the marsh area.

4. A similar access problem exists with regard to the 80 acres in the northeast quarter of Section 25. While there is dry land north and west of the basin in the south half of the northeast quarter, it is impossible to travel to it across the landowners’ land to the north of the unnamed basin because of a wetland marsh which extends to the northeast of the basin. The only way to access the 80 acres in the south half of the northeast quarter is to go around the southern tip of the basin and then proceed northerly along the western edge of the basin.

5. The 40 acres which would constitute the southwest quarter of the northeast quarter, which is located north of the basin, has been enrolled in the Conservation Reserve Program. This requires weed control. In addition, the landowners plant ten acres of corn there for wildlife. As a practical matter, both activities require the use of a tractor. The only way that the landowners have been able to get a tractor to that "Northwest 40" is by entering their land from the east, going around the south end of the basin, and then proceeding northerly along the west side of the basin to the Northwest 40. Unfortunately, the use of this route requires encroaching upon land owned by Daniel Schmidgall. In fact, the tip of the basin crosses the line between Schmidgall's land and the landowner's land, so that going around the western edge of the basin means crossing onto Schmidgall's land. In addition to this ownership factor, the topography along the western edge of the basin is that of a short, but relatively steep, ridge of approximately 15 feet in elevation. At the top of this "mini-bluff" is Schmidgall's field, which is planted into corn or beans, and irrigated. At the bottom of the mini-bluff is the shoreline of the basin, and there is even some water on Schmidgall's side of the property line. Schmidgall irrigates his field (which is evident from Ex. 6), and water from the irrigation just misses the edge of the water basin, but does extend to the top of the mini-bluff.

6. Between 1985 and 1991, the landowners accessed the Northwest 40 by the same route, which extended along the south edge of the basin, and then turned to the north and proceeded along the western edge. The degree of encroachment on Schmidgall's land depended on what kind of equipment was being used, how dry the land at the bottom of the mini-bluff was, and other factors which determined whether or not it was necessary to drive on the very top of the bluff, or whether it was possible to drive along the bottom of it, or even a little bit along the side. However, in wet years, doing anything but driving along the top was dangerous, particularly in larger tractors. And due to the bluff line and the distances involved, driving along the top of the bluff means disturbing Schmidgall's crops.

7. In 1991, Gustafson pushed a gravel road across the very western edge of the wetland by dumping fill into the basin. This road ran north and south, approximately on the half-section line, the line which divides the landowners' land and Schmidgall's land. The purpose of this road was to gain dependable access to the Northwest 40 with large tractors. The road can be seen in Exhibits 2 through 6, and has been cross-sectioned in Exhibit 12. As can be seen from the photographic exhibits, the road does separate a tiny portion of the water basin from the rest of the basin, essentially cutting it off geographically and hydrologically. It has been estimated that the water basin is 38 acres, and that the portion to the west of the road is approximately .3 acres.

8. The road fills approximately 8,000 square feet of wetland, and blocks Schmidgall's access to the vast bulk of the wetland. The fill has a maximum depth of approximately four feet.

9. The road was constructed without any permits, or indeed without any consultations, with either the U.S. Fish and Wildlife Service or the Department of Natural Resources.

10. In October of 1991, the Fish and Wildlife Service received a complaint about the road. In November of 1991, an aerial observation revealed the existence of the road (Ex. 6). The Fish and Wildlife Service notified the Department, and on May 6, 1992, Larry Lewis of the U.S. Fish and Wildlife Service and Julie Aadland of the DNR's Fergus Falls office made a joint visit to the site. They decided that the Fish and Wildlife Service would take the lead to pursue restoration of the basin. However, due to workloads and higher priorities, nothing was done by the Fish and Wildlife Service. Finally, on August 26, 1996, Julie Aadland sent a certified letter to Gustafson, informing him that the road was built without a DNR permit, that a permit was required, that the rules prohibited the construction of private roads through protected waters, and that the road must be removed by November 30, 1996. Ex. 18.

11. On September 30, 1996, Gustafson replied, indicating that the road is necessary for access in order for him to fulfill his CRP obligations, that the water basin was artificially constructed many years ago, but culverts which allowed the water to flow out of the south end of the basin had been maintained by him for ten years and without his efforts, the basin would have overflowed, washed out the dike, and drained the wetland. Ex. 19.

12. On November 15, 1996, Aadland replied, stating that the wetland was classified as a protected water in the 1980s, that the culverts and dike were constructed approximately 30 years previously and have established the boundaries of a protected wetland, and reiterating the Department's position that the road must be removed. On that same date, Aadland sent a copy of her August 26 letter to the other members of the landowners group, who had not previously received it.

13. On November 22, 1996, Larry Lewis of the Fish and Wildlife Service sent a certified letter to Gustafson and the other landowners reminding them of a 1985 easement prohibiting the draining, filling, or unapproved burning in the wetland. The letter ended with a "formal notice" that the Fish and Wildlife Service supported the DNR's road removal request and that Gustafson should do no work to cause a change in the existing outlet elevation of the south dike road and culvert. Ex. 17.

14. Attached to Lewis' letter was a copy of Waterfowl Management Easement 259X, entered into between the First Bank of South Dakota and the Department of the Interior. It covers the entire southeast quarter of Section 25, and was granted by the bank to the Fish and Wildlife Service in exchange for \$10,320.00. Ex. 17. There are issues concerning the enforceability of this easement. They are beyond the authority of the Administrative Law Judge and the Commissioner to decide, and are not relevant to the issue to be determined in this proceeding. See, Memorandum.

15. On November 25, 1996, Gustafson replied to Aadland's letter of November 15 and Lewis' letter of November 22. He basically stated that he would not remove the road unless one of the agencies obtained an easement or purchased land from Schmidgall so that Gustafson could have access to the Northwest 40. He offered to continue maintaining the dike at the south end of the basin, repairing damage and making improvements as necessary, as well as continuing to maintain the ten-acre wildlife plot to the north, so long as the agencies allowed him to keep the road. Ex. 22.

16. On December 10, 1996, Aadland requisitioned a survey from the Department's Hydrographic Unit, which was performed on August 5, 1997. The survey determined that the ordinary high water mark of the basin was 1330.2 feet above mean sea level, 1929 NGVD. The survey also determined that the majority of the road fill lay below that figure, and thus was in the bed of the basin. Ex. 11.

17. On June 2, 1998, Kent Lokkesmoe, director of the Department's Division of Waters, issued Findings of Fact and Order, directing the landowners to remove all road fill on or before August 31, 1998. Ex. 1. On June 25, 1998, Gustafson requested a hearing on the Order.

18. On January 14, 1999, the Department issued its Notice of and Order for Hearing in this matter, and on January 15, 1999, it was served upon a variety of federal, state, regional and local officials having an interest in the matter, as well as upon the landowners. It was published in the EQB Monitor on February 8, 1999. Ex. 26.

19. At the start of the hearing, Mr. Gustafson stipulated to most of the factual allegations contained in the Commissioner's Findings of Fact and Order dated June 2, 1998. He stipulated to Findings 1 through 11, as well as the following version of Finding 13:

The filling has altered a portion of the wetland by converting it to a roadway.

20. In addition to the CRP land and the wildlife crop plot, the landowners have also constructed two ponds in the south half of the northeast quarter. Although this was done without any consultation with either the Fish and Wildlife Service (which has an uncontested easement on that property) or with the Department of Natural Resources, both agencies agree that the construction does benefit wildlife and are willing to allow it to remain. The only question is with regard to the location of the spoil from one of the ponds, which is a relatively minor issue.

21. Unnamed Basin 61-287W does provide public benefits, in the form of water quality filtering, flood reduction, and wildlife production, particularly waterfowl.

22. The construction of the road displaced emergent and submergent plants used by waterfowl, and created a predator trail. The road makes the west bay less useful to waterfowl, and has the potential for increasing erosion into the wetland because of erosion from the side of the road.

23. The dike on the south end of the wetland was created in the late 1950s, and it does serve to keep standing water in the basin. Without the dike, there would be little or no standing water in the basin.

24. In 1996 or 1997, Larry Lewis talked the then Martin County Attorney, Charles Glasrud, who informed Lewis that the landowners could legally create an access right to their property. It is unclear whether Lewis passed this information along to Gustafson or not.

25. Schmidgall has never objected to the landowners crossing his land, or damaging his crops. The landowners have never asked Schmidgall for permission to do what they were doing, and have never tried to get an easement from him, or buy any

of his land, except for one indirect contact, which is discussed below. The landowners have never petitioned the township or the county for a cartway or other forced access to their land.

26. At some unspecified time, Gustafson approached Leroy Fair, a realtor, and asked Fair to talk with Schmidgall about selling Gustafson some of the land. Fair knew Schmidgall because Fair had been the realtor who sold Schmidgall his property in 1984. As Gustafson described the conversation between Fair and Schmidgall, Fair asked Schmidgall if he would be willing to sell some of his land, and Schmidgall replied that he was not selling. That was the extent of the conversation, and no specifics of acreage or price were discussed.

27. The landowners have not exhausted attempts to gain access to the Northwest 40 by alternative means. There has been no serious attempt to negotiate with Schmidgall, nor has there been any attempt to seek legal means to force access. The landowners have not attempted to obtain access from other neighbors, such as Clifford Fadness, who is a landowner in the north half of the northeast quarter of the section.

28. At the time that the road was put in, the landowners also placed a drain tile to connect the two water bodies that were separated by the road. The drain tile worked for a year or two, but it is not clear if it still functions.

29. In June of 1986, the Fish and Wildlife Service sent a letter to Gustafson, reminding him of the easement which covered the southeast one-quarter of Section 25. The letter referred to "Section 25, SE ¼" in the cover page, and included a copy of the easement contract. Gustafson acknowledges receiving the letter, but did not look at it carefully. Ex. 16.

Applicable Law

30. Minn. Stat. § 103G.245 (1998) provides that persons must have a public waters work permit in order to "change or diminish the course, current, or cross-section of public waters, entirely or partially within the state, by any means, including filling, excavating, or placing of materials in or on the beds of public waters." There are certain exceptions, none of which are applicable to this situation.

31. Minn. Stat. § 103G.251 authorizes the Commissioner of Natural Resources to investigate activities being conducted without a permit that may affect waters of the state. That statute also allows the Commissioner to make findings and issue orders related to activities being conducted without a permit. If the findings and order are issued without a hearing (as was done in this case), the person to whom the order is issued may demand a hearing.

32. The broad scope of the basic prohibition contained in Minn. Stat. § 103G.245 is made more specific by a series of rules which have been adopted by the Commissioner. Of particular import to this case is Minn. Rule pt. 6115.0190, subp. 3, which provides as follows:

Placement [of fill] shall not be permitted in the following cases:

* * *

- F. To construct a roadway or pathway, or create or improve land accesses from peripheral shorelands to islands, or to facilitate land transportation across the waters; . . .

There is further language authorizing a limited exception for certain kinds of roads proposed by federal, state or local government agencies, but that is not applicable in this case.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Commissioner has jurisdiction in this matter pursuant to Minn. Stat. §§ 103G.005, subd. 15 and 103G.251 (1998). The Administrative Law Judge has jurisdiction over this matter pursuant to Minn. Stat. § 103G.251 and Minn. Stat. § 14.50 (1998).
2. Notice of the hearing was timely given, and all relevant substantive and procedural requirements of law or rule have been fulfilled.
3. Minn. Rule pt. 6115.0190 prohibits the placement of fill to construct a roadway or pathway. The landowners violated Minn. Stat. § 103G.245 and Minnesota Rules pts. 6115.0190 and 6115.0191 by placing fill below the ordinary high water level of Unnamed Basin 61-287W without first obtaining a permit.
4. The Commissioner's Findings of Fact and Order, dated June 2, 1998, requiring the landowners to remove the fill, properly dispose of it, pay certain fees and take other actions, is a reasonable exercise of the Commissioner's authority granted in Minn. Stat. § 103G.251, subd. 2 (1998). It is in the public interest that the actions be taken to restore the area to its pre-fill condition.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RESPECTFULLY RECOMMENDED that the Commissioner's Order be AFFIRMED in its entirety.

Dated this 4th day of June, 1999.

s/ Allan W. Klein

ALLAN W. KLEIN
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the Department is required to serve its final decision upon each party and the Administrative Law Judge by first-class mail.

Reported: Tape Recorded, no transcript prepared.

MEMORANDUM

I.

There are really very few factual disputes in this case. The landowners admit to having placed the fill, but argue that the benefits gained outweigh the damages, and thus the road ought to remain in place. But the law does not allow them to make that decision. Instead, the law vests that decision with the Commissioner. The Commissioner has chosen to adopt rules which flatly prohibit private landowners from doing what they did, and places severe limitations on the ability of even a governmental entity to do it. Not only are the landowners not a governmental entity, they have failed to demonstrate that even a government could meet the tests imposed. The Commissioner was fully within his legal rights to order the restoration of the area, including the removal of the road.

This case is remarkably similar to one which has been twice to the Court of Appeals. See, *Matter of Eigenheer*, 453 N.W.2d 349 (Minn. App. 1990) and 1995 WL 351652 (Minn. App. 1995). That case relied upon the same rule, Minn. Rule pt. 6115.0190, subp. 3(F), which prohibits the construction of a private roadway to facilitate land transportation across public waters. Eigenheer challenged the validity of the rule, and the Commissioner's interpretation of it. The court held that the rule was valid, and supported the Commissioner's interpretation. There are no significant differences between the fill placed by Eigenheer and the fill placed by the landowners in this case. The long and short of the matter is that the Commissioner was following the law when he ordered the restoration, and the landowners must comply with it.

II.

The Administrative Law Judge has not gone into the details surrounding the validity of the Fish and Wildlife Service's easement because the Commissioner cannot enforce it. Instead, the Commissioner relied on his own independent state statutory authority to issue the order for restoration. Having determined that the Commissioner had authority to issue that order, there is no reason to deal with the factual issues surrounding the easement. It is up to the federal government to enforce the easement, and the Administrative Law Judge expresses no opinion concerning the validity of the easement.

III.

The landowners have done much to improve the wildlife production on their land. David Gustafson, in particular, has “donated” many hours to maintaining the dike, digging ponds, and otherwise improving this land. The Administrative Law Judge hopes that the Department can assist the landowners in developing some alternate access to their property so that all of these beneficial activities can continue.

AWK

^[1] The term “landowners” in this Report refers to David W. Gustafson, Carol Gustafson, Lowell G. Wakefield, Darlene Wakefield, Bruce E. Nystrom, JoAnn Nystrom and Patrick J. Flynn.

^[2] Attached to the end of this Report are copies of maps which help explain some of the geography in this area.